THE SUPREME COURT DURING THE CIVIL WAR

BY

DAVID MAYER SILVER

A.B., Butler University, 1937

A.M., University of Illinois, 1938

AN ABSTRACT OF A THESIS

SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY IN HISTORY IN THE GRADUATE SCHOOL OF THE UNIVERSITY OF ILLINOIS, 1940

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The subject of this thesis was suggested to the author by Professor J. G. Randall of the University of Illinois, under whose direction it was written. The author wishes to thank Professor Randall for his kindness in proposing this study of the Supreme Court, for continuous advice and assistance in the construction of the thesis, and for generous reinforcement in research.

THE SUPREME COURT DURING THE CIVIL WAR

Despite the amount of historical literature that deals with Abraham Lincoln, there remains much research to be done in connection with his career. The brief period in his life when he was President, for example, continues to absorb the attention of the historian. Among the various phases of Lincoln's presidency, none seems more worthy of treatment than his relation to the Supreme Court of the United States and the Court's role in the crisis which engulfed the nation. Up to the present no work has attempted to deal specifically with the Supreme Court during the Civil War. Numerous writers, of course, have touched upon the problem; none has concentrated upon it alone.

Lincoln was President of the United States during a period of extreme national crisis. The very life of the republic was at stake. It remained to be seen whether a republic such as the United States could maintain its territorial integrity and constitutional liberties in the face of open and armed resistance. President Lincoln, whose position was challenged by the civil strife, maintained that it was his duty to preserve the territorial and political integrity of the nation. He felt that the Constitution obligated him to preserve the Union and conferred power upon him to do so. Nonetheless, the Supreme Court, whose own jurisdiction was likewise challenged by the conflict, would decide upon the legality of measures devised to prosecute the war. Was the Court to accede to Lincoln's constitutional theories of emergency executive powers, or was it to declare them unconstitutional?

In this study of the Supreme Court as an institution, although no effort has been made to write a biography of each member of the Court, essential facts regarding the justices have been provided. Lincoln's five appointees, as well as the reasons for their appointment, are considered in detail. Although the scope of this thesis excludes consideration of the reconstruction period, the Milligan case, in which the Supreme Court reasserted its authority, has been dealt with in relation to cases decided during the war. Emphasis has been placed on matters relating to the war itself; other phases are usually treated by generalization. The California land cases, which constitute in themselves the subject for a thesis, are considered only as a factor contributing to en-

largement of the Court. It should be noted that this study is basically historical rather than legal. It proceeds upon the same principles that Professor J. G. Randall expressed in the preface to an historical work dealing with legal problems. Professor Randall wrote: "In this . . . discussion my purpose has been to apply the critique of historical research and the canons of historical interpretation to legal material, making only such excursions into technical matters of law as the larger purposes of historical study require."[1] Emphasis is not placed upon cases in themselves; interpretation of the cases in relation to the larger problems involved is the primary consideration.

The precise role of the Supreme Court in the struggle to maintain the Union is the main theme. Did the Court assist or hinder the administration during the war? Was the Court vigorous or inert? Such are the questions to be investigated. Special emphasis has been placed upon the following aspects: the Supreme Court in the national crisis, the senatorial attack upon the Court, the reorganization of the circuits, the dilution of the Taney Court, the Court under Chief Justice Taney, the war cases, the general business of the Court, and the new Chief Justice.

The Supreme Court was viewed suspiciously by President Lincoln and his administration on the outbreak of the Civil War. The justices were politically opposed to the President, and their attitude toward efforts to subdue the rebellion was unknown. It was generally assumed that the Court might impede the efforts made by the administration to defeat the South. Lincoln had joined in the assault upon the Supreme Court because of its decision in the Dred Scott case, and he explicitly reiterated his stand in his first inaugural address. He affirmed that the Supreme Court should not decide public questions irrevocably. Despite his attitude President Lincoln did not direct a campaign against the Court. Instead, the administration involved itself in the more immediate problem before it, maintaining the integrity of the Union.

When Lincoln became President, there was already one vacancy on the Supreme Court because of the death of Justice Peter V. Daniel on May 31, 1860. President Buchanan delayed making an appointment to the Court. In the fall rumors were circulated

[1] Randall, *Constitutional Problems under Lincoln*, preface, viii.

that Chief Justice Taney had resigned, but Taney's opponents simply were reveling in some wishful thinking. On February 5, 1861, Buchanan nominated Jeremiah S. Black of Pennsylvania as associate justice, but the United States Senate on February 21 refused to confirm the appointment. At an earlier date confirmation would have been possible; now, however, senators from seceded states had resigned, and there was opposition by Douglas and his followers. Early in Lincoln's administration rumors were rife regarding the appointment of justices. John J. Crittenden of Kentucky, who had made valiant efforts for compromise, was proposed in order to reassure the South.[2] Secretary Seward urged the appointment of George W. Summers of Virginia. Joseph Holt of Kentucky likewise was suggested. The times called for energetic military action, and a preoccupied President delayed consideration of Court appointments. Sumter was attacked, the conflagration was set off, the judicial question was relegated to an unimportant position.

In the midst of the crisis of the early days of the Lincoln administration two additional vacancies arose by the death of Justice John McLean on April 4, 1861, and the resignation of Justice John A. Campbell on April 25. McLean's death resulted in moves to put Salmon P. Chase, Thomas Ewing, Noah H. Swayne, Edward Bates, Stephen T. Logan, or William Y. Gholson, on the bench. Campbell had opposed secession, but he considered it a constitutional privilege. The depth of his despair was indicated by remarks in a letter to Justice Nathan Clifford: "This administration seems determined to have a sectional war. . . . I suppose the Congress at Montgomery will formally declare war—What will the end be? The frightful excitement at the North has stimulated the administration to desperate measures & there is a party in the Confederate States equally desperate—Oh for peace peace[.]"[3] Justice John Catron of Tennessee and Justice James M. Wayne of Georgia, also Southerners on the supreme bench, remained steadfastly loyal to the Union. Despite the Campbell resignation Lincoln still made no appointments to the Court. There were now three vacancies.

President Lincoln claimed constitutional emergency executive powers in order to cope with the rebellion. He felt he was obli-

[2] New York *Times*, Mar. 7, 1861, p. 1.

[3] J. A. Campbell to Nathan Clifford, Apr. 29, 1861, Clifford MSS., Maine Historical Society.

gated by the Constitution to preserve the Union and claimed power under the Constitution to do so. It was precisely on this issue that President Lincoln and Chief Justice Taney differed. The Chief Justice, while on circuit in Baltimore, enunciated in the Merryman case his interpretation of the Constitution: the Constitution is no different in time of war than in time of peace. Taney attempted to secure the release of John Merryman, a citizen of Maryland whom military authorities had arrested on the charge of aiding and abetting the South, but found he was resisted by powers too strong for a judicial officer. Because of the Merryman decision there were heaped upon Taney bitter criticism and malicious attacks comparable in his career to the reverberations of the Dred Scott decision. Taney expressed his own attitude on the war quite frankly when he wrote to Franklin Pierce:

> The paroxism [*sic*] of passion . . . appears to me to amount almost to delirium. I hope that it is too violent to last long—and that calmer and more sober thoughts will soon take its place—and that the north as well as the south will see that a peaceful separation with free institutions in each section—is far better—than the union of all the present states under a military government & a reign of terror—preceded too by a civil war with all its horror & which end as it may will prove ruinous to the victors as well as the vanquished—[4]

In his message to Congress on July 4, 1861, President Lincoln answered Taney's Merryman decision, and an opinion of Attorney General Bates upheld the power of the President to arrest and imprison persons abetting the enemy. In contrast to Chief Justice Taney's activity on circuit was that of Justice John Catron. Because he hurried to Saint Louis to hold circuit court and denounced the idea that a state could secede, Catron was warned to depart from his home in Tennessee or face the consequences. Leaving his aged wife there, he fled from the state. Justice Catron, a Union man of the South, thus made the difficult decision men of his class had to make; before his death on May 30, 1865, however, John Catron had the privilege of assuming again his legal authority to hold circuit court in the state of Tennessee.

The nation had grown rapidly, and the Federal court system no longer was adequate so Lincoln recommended in December, 1861, that circuits presided over by Supreme Court justices either

[4] R. B. Taney to Franklin Pierce, June 12, 1861, Pierce MSS., Library of Congress.

be provided for the whole nation or be abolished. From the time of Lincoln's inauguration Radicals had called for reorganization of the Supreme Court so as to bring it into harmony with the administration, and they chose the occasion of the recommendations of the President to begin an intensified onslaught upon the Court. Senator John P. Hale of New Hampshire began the vitriolic attack. He introduced the following resolution on December 4, 1861: "*Resolved*, That the Committee on the Judiciary be instructed to inquire into the expediency and propriety of abolishing the present Supreme Court of the United States, and establishing instead thereof another Supreme Court, in pursuance of the provisions of the Constitution, which in the opinion of Congress, will meet the requirements of the Constitution."[5] Senator Hale actually claimed for the Congress the right to create a Supreme Court "from time to time." Republican leaders, however, realized that they could well afford to deal gently with the Court because three vacancies already existed. Since several of the justices were quite aged, resignation or death could be expected soon to remove others from the bench.

In accordance with the request of the President a bill to reorganize the Federal circuits was passed by Congress and became a law on July 15, 1862. The problem of appointments to the Supreme Court became enmeshed in the circuit reorganization; consequently, aspirants for appointment found their chances of nomination dependent upon formation of the new circuits. To take but one example, Senator James W. Grimes and Representative James F. Wilson fought a hard legislative battle in order to force creation of a circuit composed of Iowa, Minnesota, Missouri, and Kansas. They desired that their candidate for the Supreme Court, Samuel F. Miller, should not be placed in the disadvantageous position of having to compete with David Davis, Orville H. Browning, and Thomas Drummond; Miller would have had to face this competition if Iowa were in the same circuit as Illinois. In disgust Representative William Kellogg of Illinois declared to the House: "I fear that too many mantles for Supreme Court judges have already been cut out, and made up. If it were not for that, there would be little trouble in arranging the States in compact circuits."[6] The circuit that the Iowans desired was created, and they and their

[5] *Cong. Globe*, 37 Cong., 2 sess., 8.
[6] *Ibid.*, 2564.

friends then had to convince the President that he should appoint Samuel F. Miller.

President Lincoln delayed making judicial appointments because he felt it would be unfair to the South if all of the positions were given to Northerners. Upon the reassembling of the Supreme Court on December 3, 1861, the need for appointments became more pressing. In addition to the three vacancies on the Court, Chief Justice Taney and Justice Catron were absent because of illness. There were not present at each session even five justices, the number necessary to constitute a quorum. Consequently, on January 21, 1862, President Lincoln nominated Noah H. Swayne of Ohio. Swayne's appointment resulted from the support of three important Ohio Republicans: John Sherman, Benjamin F. Wade, and William Dennison. Since the Ohio circuit was vacant, it was natural that Lincoln should pay political debts. Justice Swayne promptly became a valuable member of the Court; he found his duties burdensome because when he was appointed the Chief Justice was over eighty, and four of the five associate justices were either just over or just under seventy. A plan to provide for the retirement of aged justices was sponsored in the Senate almost two years later, but it failed. Following Swayne's appointment, Lincoln awaited passage of the circuit bill. The day after he approved the reorganization of the circuits, Lincoln nominated Samuel F. Miller as associate justice. Iowa's governor and its senators and representatives in Washington had been energetic in Miller's behalf, and it was a foregone conclusion that Miller would be appointed if a trans-Mississippi circuit were created.[7] As a member of the Court Miller proved second to none in the attempt to guide the judiciary safely through the shock of civil war without loss of just power by the government and without loss of rights by the citizen. Following Miller's appointment, one vacancy remained; the chief aspirants were Orville H. Browning, Thomas Drummond, David Davis, and Caleb B. Smith. Although Lincoln was quoted as having said that Browning would receive the post,[8] apparently Browning's conservatism and the strong claims of David Davis could not be surmounted, so Lincoln appointed Davis

[7] S. F. Miller to Mrs. J. W. Grimes, Aug. 28, 1888, quoted in *Iowa Historical Record*, VII, 88-89.

[8] N. H. Swayne to B. F. Wade, Jan. 10, 1862, Wade MSS., Library of Congress.

on October 17, 1862. Davis' friends, who claimed the justiceship as political remuneration, had exerted strong pressure upon Lincoln. The Davis appointment filled the last of the three original vacancies, but President Lincoln made two additional appointments to the Supreme Court. On March 3, 1863, a tenth justice, who was to preside over a circuit in the Far West, was provided by an act of Congress. The new circuit was created for divers reasons, the most valid of which was the need for a member of the Court who was well acquainted with cases involving claims based on Spanish and Mexican land law. The formation of this circuit was in harmony with the circuit reorganization of 1862. In addition, other factors must be considered in attempting to determine the reasons for providing a circuit for California and Oregon. Loyalty to the Union was stimulated by the construction of a judicial circuit in the Far West, and the Taney school's control of the Supreme Court was weakened. Formation of the tenth circuit was not actually packing the Court, however, as members of the Court were not adequately prepared to deal with the California land cases. To fill the tenth justiceship Lincoln named Stephen J. Field, a Union Democrat. Field, as a member of the California supreme court, had been dealing successfully with land cases. Although from March 3, 1863, to July 23, 1866, there were ten justices on the bench of the Supreme Court, an investigation of the Court's manuscript minutes indicates that the ten met together only on five different occasions. Lincoln's final appointment to the Court was that of Salmon P. Chase in December, 1864. Roger B. Taney died the previous October. Lincoln probably would have preferred someone else because he feared that Chase would not be satisfied. Various individuals desired the nomination or were mention in connection with it: Justice Swayne, Justice Grier, Justice Wayne, Edwin M. Stanton, Joseph Holt, William M. Evarts, Edward Bates, and Montgomery Blair. Lincoln sensed the general desire for Chase's appointment, and so Chase became Chief Justice. It is manifest that to Lincoln Unionist views and common sense were of primary importance; he was more interested in the political sentiments of his appointees than in their judicial experience. Of the five men Lincoln appointed to the Court, only David Davis and Stephen J. Field had served previously as judges.

The administration feared decisions of the Taney Court on such problems as seizure for prize, arbitrary arrest, legal tenders, and

other matters related to the war. In certain instances appeals to the Supreme Court were discouraged in order not to have to face the liability of adverse decisions. Attorney General Edward Bates revealed this policy in a letter to Secretary of War Stanton, who wished to appeal a case to the Supreme Court. Bates wrote:

> But suppose that the Supreme Court, *invoked by the Executive* to sustain these arrests should pronounce them illegal. You will readily agree with me that such a decision at this time would do more to paralyse [*sic*] the Executive arm and to animate the enemies of the Union than the worst defeat our armies have yet sustained.
>
> Surely this peril ought not to be invoked *by us,* . . . .
>
> . . . .
>
> If then, we have reason to fear that their decision will be against the power, or if we do not know that it will sustain it, ought we *now* to incur the risk of an adverse decision. If we can better conduct the Government through its present peril without the aid of such a decision from the Supreme Court, than we can with the decision *against* the power assumed by the President, surely it is the part of wisdom to bear our present ills rather than to seek relief in what may be a greater one.[9]

To the Lincoln appointees the primary consideration was Union victory; they could be expected to uphold the acts of the Lincoln administration. Enough of the rest of the Court was interested in Union victory to join with Lincoln's appointees to form a majority favorable to the Union cause. Chief Justice Taney, of course, was unsympathetic with the efforts of the administration. Justice James M. Wayne of Georgia and Justice John Catron of Tennessee supported the Lincoln government. Justice Samuel Nelson of New York, whose loyalty was that of a conservative Union Democrat, was irked by the arbitrary proceedings.[10] Justice Robert C. Grier of Pennsylvania realized the necessity of crushing the rebellion,[11] and he expressed his views forcefully in the majority opinion in the *Prize Cases.* Justice Nathan Clifford of Maine, who gave the administration the support of a conservative Union Democrat, had the difficult task of steering a course that would permit

[9] Edward Bates to E. M. Stanton, Jan. 31, 1863, Stanton MSS., Library of Congress.

[10] Samuel Nelson to Nathan Clifford, Apr. 19, 1861, and Sept. 25, 1862, Clifford MSS., Maine Historical Society.

[11] R. C. Grier to Nathan Clifford, July 24, 1861, *ibid.*

him to be loyal to his own convictions as well as to the government. It was as a consequence of the views of a majority of its members that the Supreme Court did not interfere with the administration's war policies.

Despite the political differences of the justices the Taney Court was harmonious. The Lincoln appointees were received without malice by the other members of the Court. On the other hand the new justices gained respect and regard even for the members of the Court whom they looked upon previously with contempt. It required the utmost consideration and respect for the feelings of others in order to prevent personal clashes, but the justices possessed such high regard for their fellow man that unpleasantness was systematically avoided. The great age of the Chief Justice, his admirable qualities, and the sincere coöperation of all the justices maintained a desirable calm in the Supreme Court although its members were divided sharply upon political questions. The Civil War raged, but in the Supreme Court there was tranquillity.

It is not to be assumed because there was war that the Constitution was suspended or that the Supreme Court devoted itself only to war problems. Such was not the case. The Supreme Court continued to deal with the commonplace litigation that it was accustomed to hear; in fact, war cases were exceedingly few. The justices, as was customary, continued their extensive circuit duties, traveling throughout the loyal states of the circuits to which they were assigned. It was the addition of heavy circuit responsibilities to the duties on the bench of the Supreme Court that made the work of the members so burdensome. Those justices whose circuits were in the rebellious states held no circuit court until the authority of the Federal government was restored.

The first genuine test of the sentiment of the Court came in the *Prize Cases*. In a five-to-four decision the Supreme Court upheld the administration in the crucial matters of blockade and seizure for prize. Justice James M. Wayne of Georgia made possible a majority favorable to the Lincoln government. Radicals continued to call for packing the Court in order to make the tribunal "safe," but the administration did not adopt that course. Since a majority of the Supreme Court viewed Union victory as imperative, there was developed a policy that paralleled the administration's reluctance to bring war cases before the Court. The majority of the Supreme Court, rather than deliver a decision

adverse to the government, chose to deny for the Court jurisdiction over cases concerning war problems. The Court decided that it had no jurisdiction to reverse the judgment of the New York court of errors and appeals in the case of *Roosevelt* v. *Meyer,* although in its broadest aspects the appeal questioned the validity of the legal tender act. In the Vallandigham case the Supreme Court denied that it had jurisdiction to grant a writ of *certiorari* if the decision of a military commission were involved. In these instances the Court had opportunities to declare itself upon the legality of administration policies, but the majority agreed that Lincoln was violating the Constitution in order to preserve it and so would not impede him in his efforts. This policy of the Supreme Court was stated quite frankly by Justice David Davis in the majority opinion in the Milligan case. When the Milligan case was heard, war had ceased. The Union had been saved so the Supreme Court reasserted itself. It decided that military tribunals had no power over citizens in the loyal states. In pointing out that a return to a "government of laws" was indispensable, Justice Davis indicated the true role of the Supreme Court during the Civil War when he affirmed:

> During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then,* considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation.[12]

The Supreme Court reversed the decision it made in the Vallandigham case, and Chief Justice Taney's vain appeal for a "government of laws" dominated at last. Lincoln's appointees, when they joined the rest of the Court to reinstitute a "government of laws," proved that they were not tools of the Radicals. Having attained the judicial ermine, they chose to assist in maintaining the integrity of legal processes.

[12] 71 U. S. 109.

The role of the Supreme Court during the Civil War was logical under the circumstances. Undesirous of obstructing the government the majority of the Court chose self-denial as the means to evade interference with measures devised to win the war. In addition, the administration was reluctant to permit cases involving war powers to be reviewed by the Supreme Court. Upon the return of peace all of the justices, despite political affiliation, united to assert the return to constitutional guarantees. The Supreme Court sanctioned Lincoln's war policies, recognizing his selfless integrity and realizing that his purpose was not to establish dictatorship but to preserve democracy.

BIBLIOGRAPHICAL NOTE

In the Library of Congress the manuscript collections that the author found most valuable were: the Blair MSS., the Chase MSS., the Ewing MSS., the Holt MSS., the Sherman MSS., the Stanton MSS., the Trumbull MSS., the Wade MSS., the Washburne MSS., and the Welles MSS. Among the other manuscript collections that contributed to this study were: the Chase MSS. of the Historical Society of Pennsylvania, the Clifford MSS. of the Maine Historical Society, the Orme MSS. of the Illinois Historical Survey, and the Taney MSS. of the Maryland Historical Society. Manuscripts in the possession of Mr. Edward S. Delaplaine of Frederick, Maryland, and undelivered opinions written by Roger B. Taney, owned by the New York Public Library, proved valuable. In the National Archives the author made use of three groups of material: papers of the attorneys general, papers of the state department, and files of the United States Senate. Among the newspapers the author consulted were: the New York *Times*, the New York *World*, the New York *Tribune*, the Washington *Chronicle*, the Washington *National Intelligencer*, the Baltimore *Sun*, and the Chicago *Tribune*. The author made use of the following unpublished law briefs and records: the manuscript minutes of the United States Supreme Court, the records and briefs of the United States Supreme Court, and the order books of the United States circuit court at Indianapolis.

The author used such printed sources as the *Congressional Globe* and miscellaneous government documents. Among the speeches and writings used, the most valuable were those of Abraham Lincoln, Charles Sumner, and Benjamin F. Butler. The most revealing dia-

ries and memoirs proved to be those of Edward Bates, Salmon P. Chase, Stephen J. Field, Gideon Welles, Orville H. Browning, and Charles Sumner. Various printed law reports were consulted: the *United States Reports*, the *Federal Cases*, and collections of reports of cases heard by the justices while they were involved in circuit duties. The latter group supplements the *Federal Cases*.

In addition, the author perused biographies of members of the Supreme Court as well as numerous articles and general accounts dealing with the Court.

VITA

David Mayer Silver was born in Pittston, Pennsylvania, on July 16, 1915. He attended the public schools of Kokomo, Indiana, and Indianapolis, Indiana, graduating in 1933 from Shortridge High School in Indianapolis. As an undergraduate he attended Butler University where he held a senior scholarship and served as assistant to the history department during his senior year. In June, 1937, he received the A.B. degree, *magna cum laude*, in history and political science. From 1937 to 1940 he pursued graduate work at the University of Illinois, holding a graduate scholarship for the first year. During the second and third years he held a fellowship. In June, 1938, he received the A.M. degree in history. His master's thesis was a study of the German-American treaty of 1921. During the summer of 1938 and 1939 he taught in the history department of Butler University, offering courses in American history. He is a member of Phi Beta Kappa, Phi Kappa Phi, and Phi Eta Sigma. In the fall of 1939 he spent several weeks in the East collecting material for his doctoral dissertation.